IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1193

UNITED STATES OF AMERICA,
Petitioner,

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER",
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING P. SEIDMAN
RUBIN, SEIDMAN & DOCHTER
Counsel for Respondent
425 Park Avenue
New York, N.Y. 10022
(212) 486-3330

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

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The Solicitor General, on behalf of the United States of America, has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals on remand is not yet reported. The original opinion of the court of appeals is reported at 531 F.2d 87. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a court of appeals possesses and may exercise supervisory powers to attempt to establish fair and even-handed administration of criminal justice in the circuit, by suppressing a defendant's grand jury testimony on the ground that the prosecutor did not warn the witness that she was a putative defendant, against whom the government had incriminating evidence.

STATEMENT

Respondent made telephone calls as part of her duties as an employee of a debt collection agency. Without her knowledge, the recipient of one of these calls from Respondent tape-recorded their conversation, during which Respondent allegedly made threatening statements. Several months later, after Respondent had been questioned by the Federal Bureau of Investigation, she was subpoenaed to appear before a grand jury sitting in the Eastern District of New York.

Prior to her grand jury appearance, Respondent was not told that she had a right to remain silent before the grand jury. She was also not told that counsel would be provided for her if she were unable to bear the expense herself. Furthermore, she was not told that she was a putative defendant against whom the government held significant incriminating evidence, particularly the tape-recording of the allegedly threatening telephone conversation. Respondent was unrepresented at the time of her testimony, stating that she did not feel that she was in need of counsel.

During the course of her grand jury appearance, Respondent was questioned about the telepohne conversation which had taken place many months earlier. Respondent answered from memory questions propounded

by the government attorney which were, unbeknownst to Respondent, based on a transcript of the recording of the conversation which was the subject of inquiry. Respondent was indicted for perjury.

Before trial, Respondent moved to suppress her grand jury testimony on the ground that the government's warning to her had been inadequate. The district court granted the motion, basing its decision on a due process analysis. The perjury charge was dismissed.

The court of appeals affirmed the decision of the district court and held that Respondent's grand jury testimony was properly suppressed. The court of Appeals did not, however, base its decision on fifth amendment self-incrimination and due process considerations. Instead, the Second Circuit found that the government's act of questioning Respondent before the grand jury, without informing her that she was a putative defendant, was not only outside the penumbra of fair play, but was also not in conformity with established prosecutional practice in the circuit. Basing its decision on the need to secure uniform criminal procedure within the circuit, the court of appeals exercised its supervisory powers and affirmed the suppression of the grand jury testimony.

On November 1, 1976, the Court granted Respondent's petition for a writ of certiorari (No. 75-1883), vacated the judgment of the court of appeals, and remanded for reconsideration in light of *United States v. Mandugano, infra.*

On remand, the court of appeals adhered to its decision, stating it had anticipated (and agreed with) this Court's ruling in *Mandujano* and that its own ruling had not relied upon the Fifth Circuit's opinion in that case.

REASONS FOR DENYING THE WRIT

In the decision under consideration here, the court of appeals decided to exercise its power to supervise the administration of criminal justice within the circuit to secure the goal of uniform and just criminal procedure. It cannot be denied that the federal courts possess such supervisory power. The particular application of this power here, to require that putative defendants be given fair warning of their actual status prior to appearing before a grand jury, conflicts with no law of Congress, decision of this Court or of any other court of appeals. What Petitioner seeks is, in effect, for this Court either to hold that the courts of appeal do not have power to supervise grand jury procedures or to substitute its own idea of desired procedure for that of the court below.

1. That the federal courts have power to supervise the administration of federal criminal justice is a fundamental tenet of long and uniform acceptance. This supervisory power may be exercised by suppression of otherwise relevant evidence for reasons not limited to application of only minimal constitutional guarantees. This principle has been accepted as basic since the decision of this Court in *McNabb v. United States*, 318 U.S. 332 (1943). The reasoning which underlies the exercise by any federal court of its power to supervise criminal justice was stated in that case:

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force . . . Considerations of large policy in

> making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.
>
> The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, . . . this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . . And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.

318 U.S. at 340-341. (Citations omitted). Particularly applicable to the issue presented here is the statement in *McNabb* that:

> The function of formulating rules of evidence in areas not governed by statute has always been one of the chief concerns of courts: "The rules of evidence on which we practise today have mostly grown up at the hands of the judges; and, except as they may be really something more than rules of evidence, they may, in the main, properly enough be left to them to be modified and reshaped." J.B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) pp. 530-31.

Id. at 341, n. 1.

The courts of appeal certainly believe that they possess power to supervise the administration of criminal justice within their respective circuits. This fact is amply illustrated by the statement of the Ninth Circuit in *Burton v. United States*, 483 F.2d 1182 (9th Cir. 1973):

> Finally, we conceive it to be our duty, exercising our supervisory power, to assure that there be the strictest compliance with the requirement of Rule 11. That this court has such supervisory power is hardly deniable. In La Buy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed. 2d 290 (1957), the United States Supreme Court held that ". . . supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." *Id.* at 259-260, 77 S.Ct. at 315. Moreover, this pronouncement by the Nation's supreme judicial authority has been reaffirmed by every Court of Appeals, including our own, that has confronted the issue.

483 F.2d at 1187. Especially significant is the extraordinary recitation of authorities presented by the *Burton* court in support of its view.

Of course, the power of federal courts to supervise the administration of criminal justice may be circumscribed by Congress, if that body decides to assert its authority in respect to a particular matter of criminal procedure. Congress has not acted in the matter of the suppression of testimony extracted from a witness appearing before a grand jury without having been apprised that the focus of the investigation may be directed at the witness himself.

Petitioner propounds two general Acts of Congress relating to the admissibility of evidence and asserts that certain phrases of those acts, taken out of context, operate to void the well-recognized power of federal courts to supervise criminal practice in their circuits. In Support of its argument, Petitioner extracts from 18 *U.S.C.* §3501(a) the phrase: "shall be admissible in evidence if it is voluntarily given." That section, part of the *Omnibus Crime Control and Safe Streets Act of 1968*, is not applicable to this case, and was not, for this reason, relied on

by the courts below. Its basic inapplicability is amply shown when the section from which the asserted phrase was taken is read in its entirety:

> In any criminal prosecution brought by the United States or by the District of Columbia, a *confession*, as defined in subsection (c) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the *confession* was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

18 U.S.C. §3501(a) (emphasis added). In fact, this statute was not intended to apply to situations such as is involved here. Subsection (c) of §3501 forms the operational core of the statute. It provides, in pertinent part:

> In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, which such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate . . . .

18 U.S.C. §3501(c). The legislative history of this particular statute was carefully examined in *United States v. Halbert*, 436 F.2d 1226 (9th Cir. 1970), where it was concluded:

> [I]t is obvious that the prime purpose of Congress in the enactment of §3501 was to ameliorate the

> effect of the decision in Mallory v. United States (1957), 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed. 2d 1479, to remove delay alone as a cause for rejecting admission into evidence of a confession and to make the voluntary character of the confession, the real test of its admissibility.

436 F.2d at 1231. In fact, resort to the legislative history of this provision clearly reveals that Congress did not intend the section to operate to prevent a court from exercising its supervisory power to secure the enforcement of criminal law by methods which fall within the penumbra of fair play. As is stated in Senate Report No. 1097, 90th Cong. 2d Sess. 1968:

> This title would restore the test for the admissibility of confessions in criminal cases to that time-tested and well-founded standard of voluntariness. It would avoid the inflexible rule of excluding such statements *solely* on technical grounds such as delay or failure to warn the accused as to his rights to silence or to counsel. We have not nullified, however, the rights of defendants to the safeguards of federal law or the Constitution. On the contrary, we have provided a more reasonable rule in that the judge shall consider all the defendant's rights (speedy arrangement, silence, counsel, *knowledge of offense charged*) and their possible violation in deciding as to the voluntariness of the confession and thus its admissibility.

U.S. Code Cong. & Admin. News 90th Cong., 2d Sess. and 2282 (1968) (emphasis added).

The disclaimer contained in subsection (d) of the statute cannot, of course, be construed as a requirement that any "confession" must be admitted under all circumstances, as that subsection merely states that:

> Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

18 U.S.C. §3501(d).

The thrust of Petitioner's argument, therefore, is based on the citation of this non-applicable statutory enactment, and the even more general language of Rule 402 of the *Federal Rules of Evidence.* Petitioner asserts that, once Congress has used the phrase "admissible," the federal courts have lost the power to suppress evidence. That notion is, of course, not supported by analysis. The statutes cited do not mandate the admission of evidence in any and all circumstances. This fact is shown by the context of 18 U.S.C. §3501 in its entirety and is even more cogently illustrated by the fact that, while Rule 402 broadly proposes that "All relevant evidence is admissible . . . ," Rule 403 of the same *Federal Rules of Evidence* sets out a wide variety of factors which would call for the exclusion of such "admissible" evidence.

A good example of the accommodation of the supervisory power of the federal courts in matters of criminal justice — particularly in respect to grand jury proceedings — with specific enactments of Congress is provided in *In re Grand Jury Proceedings.* 486 F.2d 85 (3d Cir. 1973). There, the Third Circuit found that particular provisions of the *Crime Control Act of 1970* did not tie the hands of the court with respect to procedures not covered by the particular statute. The court was free to use its inherent supervisory powers to secure grand jury procedures which would be consonent with considerations of fair play, not limited to the bare requirements of the Constitution. *See also In re Grand Jury Proceedings.* 507 F.2d 963 (3d Cir. 1975), *cert. denied.* 421 U.S. 1015 (1975).

2. In an attempt to persuade this Court to grant certiorari, Petitioner asserts that a conflict exists between the decision in this case and that of the Third Circuit in *United States v. Crook*, 502 F.2d 1378 (3d Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975). No such conflict exists, as the only similarity between the cases is that each involves the issue of the proper use of the court's supervisory power to suppress testimony. In *United States v. Crook*, the court found that a criminal defendant in custody had been given warnings in full compliance with the requirements of the *Miranda* decision and, hence, the fifth and sixth amendments. Section 3501(a) applied to control the question of the admissibility of a confession. That is not the situation presented here. The holding of the Third Circuit that a court cannot exercise supervisory power to suppress testimony in a case which falls squarely within the scope of a Congressional enactment presents no conflict with the decision of the Second Circuit to utilize supervisory powers in a situation to which no statute directly applies.

3. The powers of a federal court to supervise the administration of criminal justice are not limited to enforcement of minimal constitutional rights. As was cogently stated in *McNabb, supra*, a federal court may develop standards of criminal procedure which more adequately guarantee fairness and justice than is secured by adherence to only the bare bones of constitutional protections. The courts of appeals have consistently acted in conformity with this power, as is illustrated by the decision in *United States v. Charamie*, 520 F.2d 325 (5th Cir. 1975). There, the court of appeals used its supervisory powers to require that the district courts limit their use of supplementary jury instructions in a manner more restrictive than would otherwise be required by the Constitution itself.

This principle has also been noted in support of the exercise of supervisory power to require uniform conduct

by the government in enforcing criminal sanctions. *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970). That court correctly perceived that a federal court's supervisory power permits it to go beyond minimal constitutional requirements if that is necessary to assure "citizens' faith in the even-handed administration of laws . . . " 434 F.2d at 10.

The propriety of the decision of the court of appeals in this case is further illustrated by the fact that the governmental prosecuting agencies in the circuit have themselves established a uniform policy of informing grand jury witnesses that they are putative defendants. The decision in this case served to protect this particular defendant from the consequences of an isolated deviation from this uniform practice, which the court found to be outside the penumbra of fair play.

Of course, the Second Circuit's decision here does not conflict with the decision of this Court in *United States v. Mandujano*, 425 U.S. 564, 96 S.Ct. 1768 (1976). There, it was held that the fifth amendment privilege against self-incrimination did not require the suppression, in a prosecution for perjury, of false statements made to a grand jury, even though the defendant had not been given *Miranda* warnings when called before the grand jury as a putative defendant. The decision here is explicitly *not* based on the constitutional grounds which were rejected in *Mandujano*. The sole basis of the decision here was the court's perception that an unfair prosecutional tactic should be eliminated from the administration of criminal justice in the circuit by the exercise of supervisory powers. The *Mandujano* case cannot be read as espousing a policy which would give support to a prosecutorial practice rejected by prosecuting attorneys in the circuit themselves. *See also United States v. Doss*, 545 F.2d 548 (6th Cir. Nov. 1976).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Irving P. Seidman, Esq.
Rubin, Seidman & Dochter, Esqs.
Attorneys for Respondent
425 Park Avenue
New York, New York 10022
(212) 486-3330

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